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TAN KIM HOO

v.

PP &amp; ANOTHER APPEAL

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COURT OF APPEAL, PUTRAJAYA

GOPAL SRI RAM JCA

ZULKEFLI MAKINUDIN JCA

RAUS SHARIF JCA

[CRIMINAL APPEAL NOS: P-05-50-1999 &amp; P-05-51-1999]

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12 MARCH 2007

**CRIMINAL LAW:** *Firearms (Increased Penalties) Act 1971 - Sections 3 and 3A - Appeal against conviction and sentence - Defence - Whether considered in its entirety - Whether lacking in credibility - Identification evidence - Whether trial judge directed himself correctly - Whether convictions safe*

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**CRIMINAL PROCEDURE:** *Defence - Alibi - Whether trial judge erred in holding defence to be one of alibi - Whether trial judge considered defence in its entirety notwithstanding misdirection*

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**EVIDENCE:** *Identification evidence - Accused, of - Mistaken identification - Principles applicable - Whether trial judge directed himself correctly*

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Both the accused were charged under ss. 3 and 3A of the Firearms (Increased Penalties) Act 1971, and subsequently convicted and sentenced to death. This was their appeal against that decision. The prosecution's case was that the first accused discharged a firearm in the course of a robbery that resulted in

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death to one person and injury to another, and that the second accused was with the first accused when the shooting took place.

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Both accused attacked the judgment under appeal on two grounds. The first ground was the issue of alibi in respect of the second accused. This was a matter that was considered *suo motu*

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by the learned judge. In his defence, the second accused said that he was not the person who was with the gunman. His evidence was that he was outside the bar when the shooting and robbery took place, and he suggested that it was a person called David who was the real culprit. The learned judge held this defence to be one of alibi, which required the giving of notice pursuant to s. 402A of the Criminal Procedure Code. He also held that since notice had not been given, the second accused's defence could

not be considered. The other ground advanced by both accused was in respect of their identity as the perpetrators of the offence with which each was charged. It was submitted that the test identification parade had been badly conducted and that having regard to all the surrounding circumstances, it was unsafe to sustain the convictions based on identification evidence.

**Held (dismissing the appeal)**

**Per Gopal Sri Ram JCA delivering the judgment of the court:**

- (1) The defence of the second accused was not, on the peculiar facts of this case, one of alibi and the learned judge erred in holding that it was. However, it was plain even from a cursory reading of the judgment that the learned judge did in fact consider the defence of the second accused in its entirety but found it to be lacking in credibility. No doubt, the learned judge misdirected himself on the alibi point, but the way in which he approached the second accused's defence puts beyond any doubt that no substantial miscarriage of justice was occasioned on the facts of the present instance. Although he said he would disregard the so-called "alibi" defence, the learned judge nevertheless went on to consider in depth the second accused's defence in its entirety, particularly on the point that it was not he but one David who was the person who probably discharged the firearm. That much was clear from the relevant passages from the judgment under appeal. This was accordingly an appropriate case to apply the proviso to s. 60 of the Courts of Judicature Act 1964. (paras 5, 6 & 7)
- (2) There was no error whatsoever in the directions by the learned judge unto himself on the issue of the identification of both accused. It was clear that the learned judge gave his most anxious consideration on the issue of mistaken identification, but the evidence presented to him was compelling and he was entirely correct in acting upon it. The issue of identity of each of the accused in the instant case was a question of fact and must be determined by a trial court like any other fact sensitive issue in accordance with well-established guidelines governing the judicial appreciation of evidence. The pertinent passages from the judgment under

- A appeal showed that the learned judge appreciated the evidence placed before him and applied the correct legal tests to that evidence. He asked himself the right question and took into account all the relevant material. He was well aware of the danger of acting on evidence of identification and
- B subjected the evidence on that issue to careful scrutiny. Having done all that, he found the evidence compelling and therefore acted on it. And he gave cogent reasons for so doing. Nothing more may fairly be expected of a trial judge in a case as this and, indeed, the direction by the learned judge
- C on the issue of identification was admirable and beyond criticism. *Thomas Heng Aik Ren v. PP* (foll). (paras 12 & 13)
- (3) Upon careful scrutiny of the evidence on record and careful examination of the judgment under appeal, the convictions of
- D both accused were safe. (para 17)

***Bahasa Malaysia Translation Of Headnotes***

- Kedua-dua tertuduh dituduh di bawah ss. 3 dan 3A Akta Senjata (Penalti Lebih Berat) 1971, dan telah disabit dan dihukum mati.
- E Ini adalah rayuan mereka terhadap keputusan tersebut. Kes pendakwaan adalah bahawa tertuduh pertama telah melepaskan tembakan semasa melakukan rompakan sekaligus menyebabkan kematian seseorang dan kecederaan kepada seorang lain, dan bahawa tertuduh kedua berada bersama-sama tertuduh pertama
- F ketika tembak menembak berlaku. Kedua-dua tertuduh mencabar keputusan yang dirayui atas dua alasan. Alasan pertama adalah atas isu alibi yang berkaitan dengan tertuduh kedua. Itu adalah satu perkara yang dianggap sebagai *suo motu* oleh yang arif hakim. Dalam pembelaannya, tertuduh kedua mengatakan bahawa beliau
- G bukanlah orangnya yang berada dengan si penembak. Keterangannya adalah bahawa beliau berada di luar bar semasa rompakan dan tembak menembak berlaku, dan malah mengatakan bahawa penjahat sebenar adalah seorang yang bernama David. Yang arif hakim menganggap pembelaan ini sebagai pembelaan alibi,
- H yang memerlukan pemberian notis di bawah s. 402A Kanun Acara Jenayah. Diputuskan selanjutnya bahawa, oleh kerana notis tidak diberi, maka pembelaan tertuduh kedua tidak boleh dipertimbangkan. Alasan lain yang dikemukakan oleh kedua-dua tertuduh adalah berhubung identiti mereka sebagai pelaku kepada
- I jenayah yang mereka dituduh. Dihujahkan bahawa ujian kawad cam

yang dilaksanakan terhadap mereka adalah tidak teratur dan bahawa mengambilkira halkeadaan sekeliling, adalah tidak selamat untuk mengasaskan sabitan atas keterangan pengecaman.

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**Diputuskan (menolak rayuan)**

**Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:**

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(1) Berdasarkan fakta khusus kes ini, pembelaan tertuduh kedua bukanlah pembelaan alibi dan yang arif hakim khilaf dalam merumuskan ia sebagai pembelaan alibi. Walaupun begitu, atas pembacaan sekali imbas penghakiman sekalipun, adalah jelas bahawa yang arif hakim sebenarnya telah menimbang seluruh pembelaan tertuduh kedua tetapi mendapatinya tandus dari segi kredibiliti. Memanglah yang arif hakim telah tersalah arah akan dirinya berkaitan isu alibi. Namun, cara beliau menangani pembelaan tertuduh kedua menunjukkan tanpa sebarang keraguan bahawa tidak berlaku sebarang salah laksana keadilan yang substantial berdasarkan fakta kes di sini. Walaupun beliau berkata beliau tidak akan mengendahkan pembelaan yang dikata “alibi” itu, yang arif hakim bagaimanapun telah mempertimbang pembelaan tertuduh kedua secara keseluruhannya, terutama berkaitan dakwaan bahawa bukan dia tetapi seorang David yang berkemungkinan besar melepaskan tembakan. Ini jelas dari fasal-fasal relevan penghakiman yang dirayui. Oleh itu, ini adalah kes yang sesuai untuk dilaksanakan proviso kepada s. 60 Akta Mahkamah Kehakiman 1964.

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(2) Tiada sebarang kekhilafan pada arahan-arahan yang arif hakim terhadap dirinya berkaitan isu identifikasi kedua-dua tertuduh. Adalah jelas bahawa yang arif hakim telah membuat pertimbangan yang amat teliti atas isu silap identifikasi, namun keterangan yang dikemukakan kepadanya amat kukuh dan beliau betul sepenuhnya dalam bergantung kepadanya. Isu identiti setiap tertuduh dalam kes semasa adalah satu persoalan fakta dan hendaklah ditentukan oleh mahkamah bicara menurut panduan-panduan mantap yang mengawalselia penilaian kehakiman keterangan, seperti halnya dengan lain-lain isu fakta. Fasal-fasal yang berkaitan dalam penghakiman yang dirayui menunjukkan bahawa yang arif hakim telah menilai keterangan yang berada di hadapannya dan telah menggunapakai ujian undang-undang yang betul kepada keterangan tersebut. Beliau

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- A bertanya dirinya soalan-soalan yang betul dan telah mengambilkira kesemua bahan-bahan yang relevan. Beliau sedar tentang bahaya yang menanti apabila bergantung kepada keterangan pengecaman dan telah menghadapi keterangan tersebut kepada pemeriksaan yang teliti. Setelah melakukan
- B semua itu, beliau mendapati keterangan adalah amat teguh dan kerana itu telah bertindak di atasnya. Dan beliau memberikan alasan-alasan yang kukuh apabila bertindak sedemikian. Tiada apa lagi yang diharapkan dari seorang hakim bicara dalam kes-kes seperti ini, dan malah, arahan yang arif hakim atas isu
- C pengecaman layak disanjung dan langsung tidak boleh dikritik. *Thomas Heng Aik Ren v. PP* (diikuti).

(3) Atas penelitian terperinci keterangan, dan pemeriksaan hati-hati penghakiman yang dirayui, sabitan kedua-dua tertuduh adalah selamat.

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**Case(s) referred to:**

*Andy Bagindah v. PP* [2000] 3 CLJ 289 CA (*refd*)

*Bhagsingh v. State of Rajasthan* [1984] Cr LR (Raj) 679 (*refd*)

*George v. State of Kerala* [1998] Cri LJ 2034 (*refd*)

E *PP v. Ho Jin Lock & Another Case* [1999] 3 CLJ 849 HC (*refd*)

*R v. Turnbull* [1976] 3 All ER 549 (*refd*)

*Ryan v. Jarvis* [2005] UKPC 27 (*refd*)

*Thomas Heng Aik Ren v. PP* [1998] 3 SLR 465 (*fol*)

*Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381 FC (*refd*)

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**Legislation referred to:**

Courts of Judicature Act 1964, s. 60

Criminal Procedure Code, s. 402A

Firearms (Increased Penalties) Act 1971, ss. 3, 3A

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(*Criminal Appeal No: P-05-50-1999*)

*For the appellant - Edmund Bon (Nik Mohamed Ikhwan with him);*

*M/s Chooi & Co*

*For the respondent - Meor Hashimi Abdul Hamid FC; Attorney-General's*

*Chambers*

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(*Criminal Appeal No: P-05-51-1999*)

*For the appellant - Karpal Singh (Jagdeep Singh Deo with him); M/s Karpal Singh & Co*

*For the respondent - Meor Hashimi Abdul Hamid FC; Attorney-General's Chambers*

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[*Appeal from High Court, Pulau Pinang; Criminal Trial No: 45-6 & 7-1993*]

*Reported by Suresh Nathan*

**JUDGMENT****A****Gopal Sri Ram JCA:**

[1] There are two appeals before us: Criminal Appeal No. P-05-50-1999 and P-05-51-1999. Both arise from a joint trial of the appellants in the High Court. They were therefore heard together. For convenience, we will refer to the appellant in P-05-50-1999 as the first accused and the appellant in P-05-51-1999 as the second accused.

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[2] Both the accused were charged under s. 3 and 3A of the Firearms (Increased Penalties) Act 1971 ("the Act"). They were convicted and sentenced to death on 31 July 1999. Both appealed to this court against the conviction and sentence. The learned trial judge has dealt with the facts of this case in great detail. His judgment is reported in [1999] 3 CLJ 849. As such we find a brief recital of the facts to suffice.

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[3] The nub of the prosecution case is that the first accused discharged a firearm in the course of a robbery that resulted in the death of one M. Ramesh s/o M. Munusamy ("Ramesh") and injury to one Edmund s/o Ganamuthu (PW6) in the course of a robbery. It is also the prosecution case that the second accused was with the first accused when the shooting took place. These tragic events occurred on 5 August 1992 – more than 14 years ago – at a bar and lounge called "Hot Lips Lounge" located at Jalan Penang in Pulau Pinang.

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[4] Counsel for both accused attacked the judgment under appeal on a number of grounds of which only two require discussion. The first is the issue of alibi in respect of the second accused. This is a matter that was considered *suo motu* by the learned judge. In his defence, the second accused said that he was not the person who was with the gunman. His evidence was that he was not inside the bar when the shooting and robbery took place. He was outside. He admitted that he had entered the bar and lounge but had left it after speaking to an elderly person at the bar counter. And this was well before the shooting and robbery. He suggested that it was a person called David who was the real culprit. The learned judge held this defence to be one of alibi which required the giving of notice pursuant to s. 402A of

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A the Criminal Procedure Code. The learned judge also held that as notice had not been given, the second accused's defence could not be considered.

B [5] With respect, we are not in agreement with the learned judge. The charge as framed by the prosecution alleged that the offence took place – to quote the actual words in Bahasa Malaysia – “di Hot Lips Lounge di No 3-J, Jalan Penang”. In English it reads “at Hot Lips Lounge at No 3-J, Jalan Penang”. According to the second accused's defence, he was in fact at the Hot Lips Lounge. But he was not inside the lounge at the time of the shooting and robbery: he was outside it. To constitute the defence of alibi, the plea of the accused must be that he was not present at the scene of the occurrence at the time when the incident in question occurred: *Bhagsingh v. State of Rajasthan* [1984] Cr LR (Raj) 679. What is the “scene of the occurrence” depends upon the facts alleged in the charge. Here, as we have already said the scene of the occurrence “at the Hot Lips Lounge”. And it was the second accused's case that he was at the Hot Lips Lounge but not inside the bar and lounge at the time the incident occurred. As such his defence was not, on the peculiar facts of this case, one of alibi and the learned judge erred in holding that it was.

F [6] But that is not the end of the matter. It is plain even from a cursory reading of the judgment that the learned judge did in fact consider the defence of the second accused in its entirety but found it to be lacking in credibility. This is what he said:

G David is not a fictitious character. Still it does not translate, just because David is not a fictitious character, that it was established thereby on a reasonable doubt basis that David entered the lounge after OKT2 left the lounge. It could not be as simple as that. On the facts and circumstances of the case, as a minimum reasonable basis for a reasonable doubt, there must be some evidence of David's presence or some evidence that would or could support David's presence at or about the vicinity of the scene of the crimes or about the time of the commission of the crimes. Reasonably, there would have been that evidence, if David had entered the lounge. And surely, one witness at least at the scene would have seen – if it was true that OKT2 walked out from the lounge and David (even if mistaken for OKT2) entered the lounge after OKT2 walked out from the lounge – one of the two men who entered the lounge at 2.00 am walking out of the

lounge. At least one witness at the scene would have seen David or a third party entering the lounge. Also, OKT2 would not have not put his case, because it was so crucial to his case, that he had walked out of the lounge. But there is no evidence of David's presence and there is no evidence even remotely supporting David's presence at or about the vicinity of the scene of the crime at or about the time of the commission of the crimes. As against the weight of the unchallenged evidence on the entire sequence of events inside the lounge that not one of the two men who entered the lounge left the lounge until after the robbery and shooting, there is only the word of OKT2 who had been keeping his defence 'up his sleeve' that he walked out of the lounge before the commission of the crimes and that David walked into the lounge after he walked out from the lounge. Surely, it is evident that David's alleged role was an invention and an afterthought.

What about the defence that OKT2 was mistakenly identified and that OKT2 was not at the scene at the time of the commission of the crimes? After all, there is evidence that David had the same body size as OKT2 and some of OKT2's facial attributes: (i) PW19 testified that David was about 28 years old (OKT2 in 1992 would have been 24), of moderate built (OKT2 is of moderate built), not bearded nor moustachioed (OKT2 claimed he was sporting a moustache) not wearing spectacles (OKT2 claimed he was not wearing spectacles on the night in question); (ii) OKT2 testified that David is of Chinese descent (OKT2 is probably of mixed parentage), wearing spectacles (OKT2 wears spectacles), about 5' 6' or 7' tall (OKT2 is about that height), moderate built (OKT2 is of moderate built), with body and facial appearance similar to his (OKT2), and with a moustache – something like his (OKT2). But it is still beyond argument that there could only be the possibility that David could have been mistaken for OKT2 if only David had been at 'Hot Lips' at and or about the time of the commission of the crime. OKT2 said that he entered the lounge at about 2.00 am and that he walked to the bar counter. However, other than OKT2's assertion, and that against the weight of the unchallenged evidence, there was no evidence that David was at or about the vicinity the scene of the crime at or about the time of the commission of the crime or that David (or any third party for that matter) entered the lounge after OKT1 and OKT2 entered the lounge at 2.00 am. It is just not reasonable to accept the possibility that David (or any third party for that matter) was the bespectacled man with the gunman at the material time of the commission of the crime but mistaken by the witnesses at the scene for OKT2. The beyond all reasonable

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A doubt evidence is that the same two men who entered the lounge at 2.00 am committed the crimes in question. There was no such David at the scene.

B [7] No doubt, in this case the learned judge misdirected himself on the alibi point. But the way in which he approached the second accused's defence puts beyond any doubt that no substantial miscarriage of justice was occasioned on the facts of the present instance. Although he said that he would disregard the so-called "alibi" defence, the learned judge nevertheless went on to consider in depth the second accused's defence in its entirety particularly on the point that it was not he but one David who was the person who probably discharged the firearm. That much is clear from the above quoted passages from the judgment under appeal. This is accordingly an appropriate case to apply the proviso to section 60 of the Courts of Judicature Act 1964. See, C *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381.

[8] The other ground advanced by learned counsel for both accused is in respect of the identity of their respective clients as the perpetrators of the offence with which each was charged. E Counsel for the first accused submitted that the test identification parade had been badly conducted and that having regard to all the surrounding circumstances, it was unsafe to sustain his client's conviction based on identification evidence. Reliance was placed on the well-known guidelines laid down in *R v. Turnbull* [1976] 3 All F ER 549.

[9] For our part, we would gratefully adopt and apply as our own the following passage in the judgment of Karthigesu JA delivered for the Singapore Court of Appeal in *Thomas Heng Aik Ren v. Public Prosecutor* [1998] 3 SLR 465. His Honour said: G

In adapting the Turnbull guidelines for our local system, we have reworked the Turnbull guidelines into the following three step test. The first question which a judge should ask when encountering a case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken. H

If so, the second question should be this. Is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made? A non-exhaustive list of factors which could be considered include the I

length of time that the witness observed the accused, the distance at which the observation was made, the presence of obstruction in the way of the observation, the number of times the witness had seen the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused. In considering the circumstances in which the identification was made, the judge should take note of any specific weaknesses in the identification evidence. If the evaluation of the identification evidence, the judge is satisfied that the quality of the identification is good, he may then go on to safely assess the value of the identification evidence.

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Where the quality of the identification evidence is poor, the judge should go on to ask the third question. Is there any other evidence which goes to support the correctness of the identification? If the judge is unable to find other supporting evidence for the identification evidence, he should then be mindful that a conviction which relies on such poor identification would be unsafe. The supporting evidence need not be corroborative evidence of the kind required in *R v. Baskerville* [1916] 2 KB 658. What the supporting evidence has to be is evidence that makes the judge sure that there was no mistake in the identification.

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[10] Now, this is how the learned trial judge dealt with the issue of identification of the first accused:

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However, could Ananth, Ooi, Terrence, and Krishna, or any of them, have been mistaken in their identification of OKT1? According to all witnesses, the lights were switched on at the material time, and OKT1, whose face was not covered, was about 10 feet away from the witnesses who identified OKT1. Then quite obviously, all witnesses could see the faces of those two men who entered the lounge at about 2.00 am. Each gave cogent and acceptable reasons for their ability to recognize the gunman. Ananth said he was paying attention to the faces of those men. Terrence said that he saw clearly OKT1 with a gun. Krishna even said that she could not forget OKT1's face. According to Ooi, he first saw OKT1 and OKT2 at 12.20 am, when the lights were switched on and when he was mediating between the two groups of quarreling patrons; the faces of OKT1 and OKT2 were not covered and he was close to OKT1 and OKT2. Then obviously, Ooi could also see the faces of those two men and had sufficient time to have had an impression of

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- A their faces. Ooi recognized the men who entered the lounge at about 2.00 am as the two patrons quarrelling with the other patrons at about 12.30 am, whose faces he could recognize and probably place, perhaps almost immediately as he had seen those faces just a short while earlier. All witnesses who identified OKT1
- B had OKT1 [had them] under observation for about 15 to 20 minutes. They were only about 10 feet away from OKT1 and OKT2. The lights were lit. And all witnesses who identified OKT1 had a special reason, since they were victims of the robbery cum killing, for remembering OKT1. Then, there are no weaknesses in the identification of OKT1, and there are no
- C circumstances that could arouse any suspicion that OKT1 was mistakenly identified. There is no reason to disbelieve Ananth, Ooi, Terrence, and Krishna or doubt their testimony that OKT1 was the gunman in question. Ananth, Ooi, Terrence, and Krishna totally convinced the court, beyond all reasonable doubt, that
- D OKT1 was the gunman in question.

[11] And this is how the learned judge directed himself with regard to the identification of the second accused:

- E On the identification of OKT2, only Ananth, Ooi, and Edmund positively identified OKT2 as the bespectacled man. As said, Terrence, Krishna, and Donald failed to identify the bespectacled man, and Mr Karpal proposed that OKT2 was not the second man in question. Could Ananth and Ooi have been mistaken in their identification of OKT2. It is relevant, first, to recall the dictum of Lord Widgery at p 552:

- F If the quality is good ... the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger ... when the quality is good, as for example, when the identification is made after a long period of observation ...
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- H Evidently, both Ananth and Ooi had OKT2 under a long period of observation. Paying attention to the faces of both men, Ananth observed OKT2 for about 15 to 20 minutes. Ooi observed OKT1 and OKT2 at 12.30am, when he was mediating between the two groups of quarrelling patrons and when he was close to OKT1 and OKT2. Ooi recognized the two men who entered the lounge at about 2.00 am as the two patrons quarrelling with the other patrons at 12.30 am. Ooi had seen those two men before – the quarrel at 12.30 am was reason for remembering those 2 patrons. The faces of those two men at 12.30 am and at about 2.00 am were not covered. Both Ananth and Ooi observed the face of the
- I bespectacled man when the lounge was lit. Furthermore, Ooi

observed OKT1 and OKT2 on two separate occasions. Both Ananth and Ooi had a special reason, since they were the victims of the robbery cum killing, for remembering OKT1's accomplice. Both readily picked OKT2, at identification parades held on 18 August 1992, soon after the event.

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Already, the quality of the identification evidence against OKT2 is good, very good. But there is more that points to OKT2 as the bespectacled man. Ananth testified that the bespectacled man did not have a moustache, wore spectacles, and appeared, from his features, to be of mixed parentage. Edmund testified that the bespectacled man 'had a unique skin colour ... it was difficult to say if he was Indian or Chinese ... That marked him out'.

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Startlingly, Ananth and Edmund's description of the bespectacled man, perhaps fitting OKT2 like a glove, was not challenged.

[12] With respect, we can find no error whatsoever in the foregoing directions by the learned judge unto himself on the issue of identification. It is clear from the passages cited that the learned judge gave his most anxious consideration on the issue of mistaken identification. But the evidence presented to him was compelling and he was entirely correct in acting upon it. So far as the identification of the accused by witnesses from the witness box is concerned, we would refer to *George v. State of Kerala* [1998] Cri. LJ 2034, where Mukherjee J said:

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... So far as the first ground is concerned, the law is well settled that identification of an accused in Court is substantive evidence of the person identifying and his earlier identification in a Test Identification parade corroborates the same. In other words, want of evidence of earlier identification in a T.I. parade does not affect the admissibility of the evidence of identification in Court.

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[13] The issue of identity of each of the accused in the instant case is a question of fact. It must be determined by a trial court like any other fact sensitive issue in accordance with well established guidelines governing the judicial appreciation of evidence. The above-quoted passages from the judgment under appeal show that the learned judge appreciated the evidence placed before him and applied the correct legal tests to that evidence. He asked himself the right question and took into account all the relevant material. He was well aware of the danger of acting on evidence of identification and subjected the evidence on that issue to careful scrutiny. Having done all that he found

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A the evidence compelling and therefore acted on it. And he gave cogent reasons for so doing. Nothing more may fairly be expected of a trial judge in a case as this. Indeed we find the direction by the learned judge on the issue of identification to be admirable and beyond criticism.

B [14] As we have said, identity is an issue of fact turning on the credibility of witnesses. This court must respectfully defer to the views of the judge on issues of credibility, more so, here as he has given cogent reasons for preferring the evidence of the identifying witnesses. In *Andy Bagindah v. PP* [2000] 3 CLJ 289, Shaik Daud JCA when delivering the judgment of this court adverted to the approach that we should take to an appeal of this nature:

D There is no dearth of authorities to say that in every case, there are bound to be contradictions and discrepancies. The question to be decided by the trial judge is whether those contradictions and/or discrepancies are material ones so as to strike at the very root of the charge. It is for the trial judge to consider this since he was the one who saw and heard the evidence. In the present case the learned judge concluded that there were discrepancies but those discrepancies were not material ones. Since this involved the credibility of witnesses, we held that the learned judge was a better person to decide and an appellate court ought not to interfere with such findings.

E [15] In *Ryan v. Jarvis* [2005] UKPC 27, Lord Hoffmann said this:

F It is of course most unusual for an appellate tribunal to reverse a trial judge's findings on credibility on the ground that the evidence which he rejected has the ring of truth. The true or false note is generally more audible to the judge who hears and sees the witnesses than to the appellate court reading the record.

G [16] So too here. In the case at hand the true or false note in the ring of the evidence was certainly more audible to the learned judge. We would therefore affirm his findings of fact.

H [17] Having very carefully scrutinised the evidence on record and carefully examined the judgment under appeal, we are entirely satisfied that the convictions of the accused are safe. The appeals accordingly dismissed. The convictions entered against and the sentence passed upon each accused is affirmed.

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